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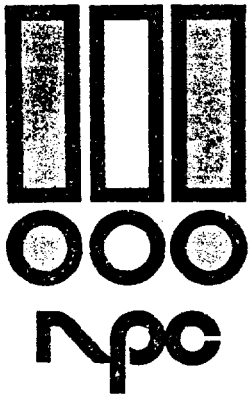
October 15, 1982



Mr. Tom Hall
OSHA, Division of Consumer Affairs
Room N-3635
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Mr. Hall:

In Re: Post-Hearing Comments on Hazard Communication, OSHA Docket No. H-022

The National Paint and Coatings Association (NPCA) hereby submits its post-hearing comments in the above-captioned matter.

During the course of the public hearings on the subject, many participants stressed that the final OSHA rule should preempt the field. NPCA agrees with others that Federal dominance is essential to a fair and workable rule because it is the only way to prevent conflicting State requirements from disrupting the goals of a Federal rule.

In the Summer of 1981, NPCA submitted a legal position paper prepared by Thomas Graves, counsel at NPCA, to OSHA, and to the Vice President's Task Force on Regulatory Reform at the Vice President's request. The position paper sets forth the legal, political, and practical points in favor of Federal dominance for regulation of chemical hazard communication.

NPCA respectfully requests that this document be entered into the record of this proceeding and considered along with the other testimony in favor of Federal preemption.

Sincerely,

Bruce Hamill

Bruce Hamill
Associate General Counsel

BH:ms

Enclosure

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A Position Paper of the

National Paint and Coatings Association, Inc.

On

Regulation of Chemical Hazard Warning In The Workplace;

The Need for a Flexible Rule Which Provides for Federal Dominance

August 10, 1981

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The Need for a Flexible Federal Hazard Warning System Which Preempts State Regulations in the Field

I. The Issue

A. Background

On January 16, 1981, the Occupational Safety and Health Administration (OSHA) published its long-expected proposal for chemical hazards identification (46 FR 4412-53).[1] This proposal was sweeping in its scope and vigorous in its requirements that manufacturers of chemical substances and mixtures identify and provide notice of chemical hazards in the workplace.

On February 12, 1981, OSHA published a notice in the Federal Register, withdrawing the Proposed Rule (46 FR 12020). The purpose of the withdrawal was to "permit the Department of Labor to consider regulatory alternatives that had not been fully considered and, if appropriate, repropose the regulation."

B. History of NPCA Involvement

NPCA has been involved in OSHA's attempts to promulgate a chemical hazard warning rule since the issuance of an Advance Notice of Proposed Rulemaking by the Agency on March 29, 1977. In commenting on the Advance Notice, NPCA reviewed the Association's deep involvement in labeling matters and its continuing efforts to provide manufacturers of paints and coatings with requisite caution information on toxicity, flammability and other hazards of the industry's industrial products. NPCA also reiterated its concurrence in principle with the recommendation of the Standards Advisory Committee on Hazardous Materials Labeling that a standard for hazardous materials labeling should be issued.

Regulation of Chemical Hazard Warning in the Workplace; The Need for a Flexible Rule Which Provides for Federal Dominance

Introduction

On May 8, 1981, Larry Thomas, Executive Director of the National Paint and Coatings Association spoke with Dr. James C. Miller III, Administrator of Information and Regulatory Affairs for the Executive Office of the President, about the Occupational Safety and Health Administration's (OSHA) consideration of a regulation establishing a warning system designed to alert workers of potential chemical hazards associated with materials used in the workplace. Mr. Thomas pointed out that NPCA has developed and the industry is currently implementing one such system called the Hazardous Materials Identification System (HMIS), designed for paint manufacturing plants. NPCA endorses a federal rule in the area which allows health and safety goals to be met through use of the HMIS for the paint industry, and equally suitable systems for other industries.

As Mr. Thomas reiterated in a letter to Dr. Miller on May 22, 1981, we recommend that when a federal rule is issued, it should be done in a manner which addresses the developing trend among the states to promulgate additional, duplicative, or contradictory chemical hazard warning rules.

This memorandum is a follow-up to the letter from Mr. Thomas to Dr. Miller. Specifically, it sets forth NPCA's position that a flexible Federal hazard warning system similar to that currently in use by industry should be implemented and that the federal system should preempt state regulation in this field. In Section IV, we provide a

suggested regulatory approach by OSHA which could pave the way for Federal preemption of state rules, providing an effective system that is workable and which industry can be recruited to support.

In supplemental comments filed on December 12, 1977, NPCA recommended that OSHA adopt a rule which would give an employer the flexibility to tailor a hazard warning program to his specific needs. NPCA stated that a systems approach, involving the use of the Hazardous Materials Identification System is the most effective means for assuring that workers handle material safely.

Since that time and prior to the January 16, 1981 proposed rule, the Association continued the development and refinement of the HMIS and promoted its adoption and use by paints and coatings manufacturers. NPCA staff met with OSHA representatives on many occasions and transmitted to them various portions of the HMIS for their review and consideration. Unfortunately, OSHA largely ignored our recommendations and published a proposed rule which would saddle our industry with an enormously expensive and burdensome regulation, without any assurance that workers would be handling hazardous materials more safely than at present. The current Administration appropriately withdrew this unreasonable proposal.

HMIS is designed to tell employees at the manufacturing level what hazards they face in working with any of some 1,500 substances used in making paints and coatings, and what protective equipment they should wear to avoid injury or illness. In brief:

1. Suppliers evaluate the hazard levels of the materials they sell and pass that information along to the paint manufacturers.

2. Manufacturers reevaluate this information, based on individual plant conditions, and put warnings on labels.

3. Employees read labels to find out how hazardous the materials in the workplace are and how to protect themselves.

The labeling system uses simple combinations of colors, numbers, and symbols to show at a glance the level of hazard involved in three categories -- health, flammability, and reactivity. Hazards are rated on a scale of "0" to "4", with "0" indicating a minimal hazard and a "4" signaling a severe one.

In a fourth category -- personal protection -- letters ranging from "A" to "K" tell the workers what protective gear to wear. For example, "A" tells the employees to wear safety glasses, and "C" calls for safety glasses, gloves and a protective apron.

Each category is color-coded: blue for health, red for flammability, yellow for reactivity, and white for personal protection, and employees are given wallet-sized cards explaining the significance of the numbers and letters.

The HMIS plan is based largely on a system developed and used by PPG Industries, Inc. since 1977. That system, in turn, is based on one pioneered by E.I. duPont de Nemours and Company, Inc. and other paint manufacturers.

On May 8, 1981, Larry Thomas, NPCA's Executive Director, met with Thorne Auchter, Administrator of OSHA, to discuss the hazard warning issue. Mr. Auchter believes it is important for his agency to ascertain what work industry is doing in the area, and what it intends to do voluntarily in the future. He stated that at present, OSHA has four priority standard setting activities under consideration including hazard warnings, and that a proposed rule is targeted to be issued

September 1, 1981. The proposed rule would issue following discussions with interested parties such as NPCA and after engaging in a risk analysis, considering alternatives, and conducting a cost/benefit review and feasibility study of the proposed standard.

In the interest of a workable solution, NPCA endorses federal regulation of chemical warning systems for the workplace. Through uniform regulation, implementation of an effective system can be guaranteed and compliance by industry greatly enhanced. Without federal preemption, individual states will enact a myriad of diverse labeling rules that would hamper interstate business operations and impede worker protection. Indeed, manufacturers in interstate commerce are faced with the threat of 50 different chemical hazard warning systems mandating conflicting, overlapping, and duplicative requirements for hazard warning. Already, there are nine states and one city which have laws specifying detailed chemical hazard warning requirements. (These are: California, Connecticut, Maine, Massachusetts, Michigan, New Jersey, New York, Oregon, Washington and the City of Philadelphia.)[2]

This threat of a multitude of divergent regulation, diluting industry compliance and undermining worker safety, is similar to that faced by industry in the consumer products area which Congress addressed by enactment of the Federal Hazardous Substances Act calling for national uniformity of hazard labeling. NPCA firmly believes that adoption of a reasonable, cost-effective Federal Chemical Hazard Warning Rule for the workplace that preempts divergent state regulation is preferable to allowing states to fill the regulatory vacuum at random.

II. The Need for a Single, National and Uniform Workplace Chemical Hazard Rule

A. The Proper Role of the Federal Government

By virtue of its comprehensive jurisdiction over matters of safety in the workplace OSHA must play a major role in any federal regulation of chemical hazard warning. A recurring criticism leveled at OSHA's performance is that the agency too often has required precise engineering controls rather than performance standards.

OSHA (or any other agency) is not capable, nor should it attempt to become involved in very detailed facets of the production process.[3] The past bias of OSHA against permitting industry the freedom of choice necessary to achieve desired ends should be replaced by an attitude that fosters worker health and safety through cooperative government, business, and worker involvement in the regulatory process.[4]

NPCA endorses the specific recommendations for the Administrator of OSHA by James C. Miller III in the November/December 1980 issue of Regulation Magazine including:

> (1) Issue a directive that henceforth personal protection devices (such as earplugs or earmuffs in the case of industry noise, or masks in the case of airborne contaminants) are acceptable ways to meet performance standards. The potential cost savings from this simple policy change are enormous. And in many cases, the result will be an increase in worker protection.
>
> (2) Where existing standards mandate engineering controls, propose revisions converting them into performance standards (thus allowing personal protection devices as a means of meeting the standards). Whether a performance standard should be met by engineering controls or personal protection devices is a matter that should be decided by employers and employees, not by the government.

(3) Issue a directive requiring that all new regulatory proposals meet two tests: anticipated benefits must exceed anticipated costs and the least costly alternative must be chosen. Moreover, such proposals must take the form of performance standards, not prescriptions of specific abatement techniques.

(4) To the extent possible, change OSHA's primary role from the setting and enforcing of safety and health standards to one of approving or, under extraordinary circumstances, modifying the standards worked out between labor and management. OSHA's function should be consultation and oversight, not command and control.

The chemical hazard warning issue lends itself neatly to the preceding recommendations for a sound approach to ensuring worker health and safety by OSHA: (1) systems such as HMIS have been devised by industry through the combined efforts of workers and management; (2) they are designed with a particular industry's production process in mind and are geared to provide workers with understandable warning information without jeopardizing proprietary rights; (3) they permit flexibility to exercise professional judgment while assuring the achievement of the objectives of health and safety standards in a cost-effective manner; and (4) they provide a sound blueprint for OSHA to write a rule which sets performance standards for hazard warning whereby particular industries may institute, subject to OSHA approval, systems which meet those standards.

B. The Importance of Federal Dominance

Federal action on the issue of chemical hazard warning for the worker should ensure uniform regulation in the area. As previously noted, several states already have laws which differ in terms of standards to be met for chemical warning. In the absence of federal pre-

emptive action, we can anticipate many more states entering the field with additional requirements which are costly and which seriously detract from the effectiveness of a system.

There is a real danger that without federal control, states following the lead of the federal government would require too much labeling information and the posting of too many hazard warning devices so as to confuse the worker and detract from his regard for warnings relating to truly serious hazards. This would result in regulations that are less effective than an even moderate federal standard.

In the past, OSHA has taken the position that a state standard which is more stringent than the federal standard is "at least as effective" as the federal standard and has permitted it to be enforced by a state with an approved plan.[5] Without federal preemption this administrative law philosophy would lead to a dimunition of a timely effective hazard warning system under the guise of numerous "more stringent" state programs.

Similarly, by mandating chemical hazard warning uniformity, the federal government can also draw a true reading of the overall effectiveness of its rule. In the past, the Agency has received criticism that its safety rules have not resulted in fewer workplace accidents than before the rules were instituted. With a single nationally uniform rule, enforcement agencies can receive feedback and undertake an efficiency review which is not complicated by state programs of varying stringencies. States would be required to enforce the requirements in a manner which complemented federal enforcement, thus encouraging companies operating in more than one state to conform with the uniform standard and to remain in compliance throughout their business operation.

The Congress and the courts have recognized that requiring too much information disclosure can dilute the impact and overall effectiveness of the message.

In Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), the Fifth Circuit held that the SEC's disclosure requirements for tender offers preempted more detailed and stringent state requirements. In doing so, the Court reasoned: "Disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosure." (577 F.2d at 1280.) This decision was predicated not on statutory language such as the "at least as effective as" language of the OSHA, but on the issue of burden on interstate commerce. However, it endorses the point that over-regulation by states in the labeling area can be less effective than uniform federal regulation.

Just as investors may be confused and even misguided by a mass of financial data, employees can be disserved by a mass of labels, label information and chemical description. If the federal government were to adopt a performance chemical warning standard supported with an appropriate finding that it had considered and rejected a proposal for specific detailed requirements, the courts should defer similarly to that finding and give the OSHA rule preemptive effect.

Congress has expressly recognized the desirability of establishing national uniform labeling requirements in the area of consumer product hazards. The Federal Hazardous Substances Act was enacted on July 12, 1960 (74 Stat. 372), as the "Federal Hazardous Substances Labeling Act." A principle purpose of this Act was to establish national uniform

PREEMPTION

> In 1960 this committee and the Senate committee emphasized the importance of uniform regulation of household products, at which the act is aimed, which are sold nationally and across State lines. It is impractical, unnecessary, and undesirable for each product to be labeled specially for those States and cities which have developed their own special forms of warnings over the years during which there was no Federal law. The committee now recommends a limited preemption amendment which would encourage and permit States to adopt requirements identical with the Federal requirements for substances subject to the Federal act, and to enforce them to complement federal enforcement, but at the same time would free marketers of products sold interstate from varying or added labeling requirements for such substances not existing or which States and cities might otherwise adopt in the future. (H. Rep. No. 2166, 89th Cong., 2d Sess.) (Emphasis added.)

The enunciated concern of Congress in the consumer area to keep the flow of commerce in products free of differing labeling requirements is equally applicable to the area of chemical raw materials distributed to industrial users throughout the U.S.

III. The Preemption Doctrine

Traditionally, the Supreme Court first looks to the federal statute and its legislative history in order to determine whether Congress intended, by operation of the supremacy clause, to preclude the states from acting with respect to matters subject to the statute.

More often than not, however, Congressional intent is inadequate to resolve a preemption question. Preoccupied with the business of legislating, Congress does not as a rule turn its sights beyond its own policies to consider possible friction with respect to state laws. (C.

labeling requirements for consumer products falling within the scope of the Act. The scope of the bill includes household products containing a wide variety of possible hazards, including such possible hazards as the lead or other metal content of paint and other surface coatings. At that time, several states had adopted legislation regulating the labeling of these household products. The word "uniform" appears repeatedly in the legislative history of the bill.

The Senate Commerce Committee was explicit:

> In recent years legislation has been enacted in several States -- Colorado, Connecticut, Illinois, Indiana, Kansas, Ohio, Texas, and Vermont -- regulating the labeling of hazardous substances suitable or intended for household use, many of which are shipped in interstate commerce. It is desirable that labeling of these substances be regulated when shipped in interstate commerce and that the standards and requirements of such labels be uniform. Thus, Federal legislation on the subject is needed to require uniform labeling of hazardous substances for household use to require that the labels of such substances: First, warn the user of any hazard in the customary use of the product; and, second, in case of an accident identify the hazardous ingredient for the attending physician. (S. Rep. No. 1158, 89th Cong., 2d Sess. (1960), p. 3).

In 1966 a limited preemption section was deemed desirable to stress both the supremacy of the federal requirements and also to make clear that the Congress encouraged states to adopt identical labeling provisions so that state enforcement could complement federal enforcement, thus removing any doubt as to the validity of state laws.

The House Committee Report accompanying the 1966 amendments to this Act explains the purpose of this section:

Hirsch, Toward A New View of Federal Preemption, 1972 U. Ill. L.F. 515, 535.) Thus to infer from congressional silence that Congress did not intend to occupy a field necessarily leads to a result in favor of additional state regulation, which may be wholly inappropriate considering the totality of the circumstances attending the operation of a federal regulatory scheme.[6]

In the absence of an express preemptive provision (e.g. the 1966 preemption amendment to FHSA), the Court has utilized four basic tests (which sometime overlap) to determine through inference whether Congress has intended, in fact, to preempt state power:

1. Whether the scheme of federal regulation is so pervasive that divergent state regulation would defeat the federal scheme and is thus superseded by the need for uniformity.

2. Whether the federal interest in the regulated field is so dominant that the federal system is assumed to preclude enforcement of state laws on the same subject, e.g. a matter affecting foreign relations;

3. If Congress has not preempted the field, whether there is actual conflict between the state laws and a valid federal statute. (Invoke the supremacy clause.)

4. If the legislation does not pertain to matters in which uniformity is necessary and state regulation does not conflict with a federal statute, whether state regulation nevertheless imposes a burden on interstate commerce that outweighs its benefit to the state.

The first test, or so-called "occupation of the ground" standard, requires a showing that it is "the clear and manifest purpose of Congress" that an area be exclusively federally regulated. (Refer to Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).) The scheme of federal regulation is so pervasive as to make reasonable the inference

that Congress left no room for the states to supplement it regardless of whether state regulation impairs the actual operation of the federal law. An important index of a congressional design to occupy a field (if it has not expressly preempted the states from acting) is the nature of the regulated subject matter; it may reveal an inherent need for nation-wide uniformity and federal primacy. (e.g. labor relations law.)

The Supreme Court in Campbell v. Hussey, 368 U.S. 297 (1961), considered a somewhat unlikely subject to preemption, a requirement that the labeling of tobacco describe its place of origin. There was no express reference to label preemption in the Federal Tobacco Inspection Act. Rather the Act provided only for uniform standards of classification and inspection. In finding that the Federal Act had preempted supplemental label requirements of the State of Georgia, the Court said:

> We do not have here the question whether Georgia's law conflicts with the federal law. Rather we have the question of preemption. Under federal law there can be but one 'official' standard -- one that is 'uniform' ....

The Court's concluding paragraph explains the effect of preemption on local law:

> We have then a case where the federal law excluded local regulation, even though the latter does no more than supplement the former. Under the definition of types or grades of tobacco and the labeling which the Federal Government has adopted, complimentary state regulation is as fatal as state regulations which conflict with the federal scheme. Missouri Pacific R. Co. v. Porter, 273 U.S. 341, 346; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230; Hood & Sons v. DuMond, 336 U.S. 525, 543.

Thus a clear expression of Congressional intent to occupy the field so as to achieve uniformity establishes federal preemption of state regulation under the supremacy clause of the Constitution, Article VI, Section 2.

Similarly, even a local regulation in exercise of police powers to promote safety and protect health, but which affects a form of interstate commerce that inherently requires a uniform rule will be automatically invalidated.[7] In City of Burbank v. Lockheed Air Terminal, Inc., (411 U.S. 624 (1973)), for example, the City of Burbank was preempted from enforcing an ordinance banning jet departures and landings at night because it was held to frustrate the purpose and operation of the Federal Aviation Act. The Court declared that the federal regulatory scheme in the air travel area was pervasive enough to render co-existence between federal and local legislation impossible.

If the Court finds that Congress has not regulated in a pervasive fashion demanding uniformity, it then employs a balancing test, weighing the state's interest in regulation against the burden placed on interstate commerce. The Court described this case-by-case balancing approach in City of Philadelphia v. New Jersey, 437 U.S. at 624 (1978): "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with lesser impact on interstate activities."

A strong case exists for merging in the Federal rulemaking context considerations under three of the preemption tests in order to frame a comprehensive ground for preemption: (1) pervasive regulation; (2) dominant federal interest; and (3) recognized need for unhampered operation. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947),

where the presence of all three factors preempted state regulation of warehouses engaged in the storage of grain distributed in interstate commerce, even though the federal scheme was less pervasive.

In conclusion, in the absence of express preemptive authority, various judicial "tests" for determining whether preemption should occur have been employed. This clearly suggests that merely promulgating a Federal standard for chemical hazard warning in the workplace may not suffice to "occupy the field" of labeling. Federal authority will permit preemption but does not require it.

In order to preempt divergent state regulation, federal agencies should promulgate a chemical hazard warning plan that is supported by administrative findings of fact and law articulating the need for national uniformity and reflecting the prevailing federal interest. It should be expressed clearly in the preamble to the regulation that it is pervasive in nature and intended by OSHA to preempt the field in the public interest.

IV. A Federal Dominance Strategy for a Workplace Chemical Hazard Warning Rule

The preceding sections of this memorandum discussed the importance of a single uniform rule applied nationally in the absence of statutory language which expressly precludes state action in an area. On the labeling issue, while Congress is silent in The Occupational Safety and Health Act regarding preemption, the fact it has provided for preemption in the labeling of consumer products under FHSA, combined with its mandatory labeling requirements for hazardous materials and wastes in transportation, argues persuasively in favor of an agency determination

that it intends that federal rules "occupy the field." (i.e. Just as uniformity was recognized as necessary to promote understanding and compliance and to facilitate goods moving in interstate commerce, so should it be required inherently for workplace hazards.)

Section 18(a) of OSHA would bar state occupational chemical hazard warning regulation only if warning standards are in effect under Section 6 of OSHA. A state that "desires to assume responsibility" for "development and enforcement" of chemical hazard warning standards with respect to which a Section 6 standard has been promulgated must obtain Department of Labor approval of its plan. The Secretary of Labor "shall approve the plan" if, inter alia, it will be "at least as effective" as the federal standard, and if the state standard would apply to products distributed in interstate commerce, it is "required by compelling local conditions and does not unduly burden interstate commerce." Section 18(c)(2).

The compelling local conditions" and "undue burden on interstate commerce" language in OSHA embodies the traditional Supreme Court approach (discussed supra) to cases challenging state regulation affecting interstate commerce. Without comprehensive federal action, state hazard warning regulations designed to protect the worker in an occupational setting or to protect health and the environment would not be totally precluded.

Therefore, to assure that the rule is pervasive and is supported by administrative findings of fact and law supporting the need for national uniformity and reflecting the prevailing federal interest, the agency should take the following approach in the statement of basis and purpose of the final rule:

1. review the arguments on behalf of state standards that vary or go beyond the federal standard, yet decide that uniformity is essential;
2. state explicitly that it intends for the Federal government to "occupy the field" of technical hazard warning in the workplace;
3. refer to Congressional recognition for the need for federal preemption in the consumer product labeling field: specifically state that it is impractical, unnecessary, and undesirable for chemical raw materials to be labeled differently according to various state laws. Express the intention to preempt but encourage and permit states to adopt requirements identical with the federal rule. This would free marketers of products sold in interstate commerce (or whose plants are located in different states) from varied or added labeling requirements, and would encourage transferability of a workers' familiarity of a system from state to state; and
4. indicate that state regulation deviating from OSHA's system would impose "difficulties" or raise other "factors" (e.g., restraint on technological innovation, costs for small business, barriers to entry or other adverse competitive impacts, compliance confusion arising from over-crowding of labels, and problems of enforcement) that "unduly burden interstate commerce," and (2) that state standards per se cannot offer a "significantly higher degree" of protection ("significantly" defined not only in quantitative terms of increments of protection but also in terms of the burden imposed by the

additional increments of protection, i.e., is the added protection measurably better in protecting health in light of its added costs.) This would serve as an effective presumption in favor of federal dominance during Agency review of individual state petitions.

NPCA generally supports the Reagan Administration's efforts to reduce the size and role of the Federal government and return authority to the states.

A significant exception to this proposition, however, is conflicting state and local action which presents administrative nightmares for the private sector and imposes undue burdens on interstate commerce. Such is and will continue to be the case with respect to chemical hazard warning rules unless OSHA fully preempts state and local activity in its rulemaking proceedings. We urge this action as outlined above.

FOOTNOTES

[1]Section 6(b)(3) of the Occupational Safety and Health Act requires OSHA to assure that: "any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warnings as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure." Congressional oversight hearings since 1975 have focused on the absence of a chemical hazard warning rule despite OSHA's explicit statutory authority and the recommendations of its own Advisory Committee which were published in 1976.

[2]Further, the AFL-CIO is promoting state legislation that would enact all or part of the withdrawn OSHA Chemical Hazard Warning Rule, which would require manufacturers to include full ingredient labeling. AFL-CIO representatives told Congressman Gaydos, Chairman of the Health and Safety Subcommittee of the House Committee on Education and Labor, at a recent hearing on the subject that in the absence of "uniform coverage and adequate enforcement: at the federal level, the federation is urging its members "to use every means -- available -- state legislation, regulations and contract language to gain information on workplace chemicals." The AFL-CIO currently is conducting a lobbying effort to assure that workers "right to know" laws are passed in all fifty states.

[3]In his "Four Questions for OSHA" pamphlet published by the American Enterprise Institute, Murray L. Weidenbaum criticizes OSHA's traditional regulatory approach in this manner:

> It is naive to expect that any group of mortal men and women sitting in Washington, or anywhere else, can develop standards that will apply sensibly all over the country. The present OSHA approach of relying on standards, inspections and sole sanctions on employers just is not working. The sensible answer is not to redouble an ineffective approach. Instead, the emphasis in OSHA regulations should be to performance, to the achievement of the desired end result.
>
> Exactly how a safe and healthy work environment is achieved is a managerial matter. Some companies might reduce job hazards by buying new equipment. Others might install new work procedures. Still others might provide financial incentives to their employees -- paying them to wear the earmuffs instead of spending much larger sums on so-called engineering noise containment.
>
> In this vein, a recent U.S. District Court decision barred OSHA from preventing Continental Can Company's use of "personal protection devices"

instead of the more expensive engineering controls. The judge noted that the Company's current program of earplugs and earmuffs was more effective than OSHA's preferred alternative.

[4]As Michael Levin implores in his article "Politics and Polarity - The Limits of OSHA Reform" in the November/December 1979 issue of Regulation Magazine:

> Reduce the adversarial nature of standard-setting and enforcement through greater reliance on co-operative structures and more realistic expectations. Plant or industry-wide worker-management safety committees could be used to rank hazards by degree of danger, to point OSHA toward regulatory opportunities, to promote cooperative problem solving, and to help make inspections a last resort rather than first-instance reflex. Standards should be focused on core hazards, the unquestionable dangers, where popular perceptions would work for rather than against the agency, with the debatable periphery left alone until a consensus for expanding the rule is formed.

[5]The stringency criterion for judging whether standards are "as effective as" the federal standards is based in part on the legislative history of the Act where it was cited (as an example) that a state requirement that work benches be two-and-one half feet apart would not be judged "as effective as" a federal requirement that they be three feet apart. (BNS, Job Safety and Health Act, p. 311.)

[6]In the labor law area, for example, the Court invoked federal preemption based on the scheme of federal statutes regulating labor relations which had achieved a balance between the competing interests of unions and management which would be disrupted by any entry of state law into the field. (Teamsters Local 174 v. Lucas Floor Co., 369 U.S. 95, 104 (1961).)

[7]This rule, first set forth in Cooley v. Board of Port Wardens, 52 U.S. 298 (1852), imposes a severe burden of showing an inherent need for uniformity. In Cooley, the Court reasoned that the added cost to shipowners of a Pennsylvania pilotage requirement was permissable due to the impossibility of enacting a uniform rule throughout the nation. The burden is even greater in the environment, public health and safety areas, in which the Court may defer even to state regulation that imposes an unavoidable burden on interstate commerce. City of Philadelphia v. New Jersey, 437 U.S. at 623-624.